

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

**WEIMIN CHEN
for Himself and All
Others Similarly Situated,**

Plaintiff,

v.

**SIERRA TRADING POST, INC.,
and DOES 1-20, inclusive,**

Defendants.

No. _____

**CLASS ACTION COMPLAINT FOR
DAMAGES, INJUNCTIVE AND
DECLARATORY RELIEF UNDER THE
CONSUMER PROTECTION ACT, RCW
19.86, AND THE WASHINGTON
COMMERCIAL CODE, RCW 62A.2-313**

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1 Plaintiff WEIMIN CHEN, demanding trial by jury as to all issues so triable in a separate
2 document filed herewith, alleges as follows, on personal knowledge and/or on information and
3 belief, against Defendant Sierra Trading Post, Inc. ("Sierra Trading Post"), and Defendants Does
4 1 through 20, inclusive:

5 **I. INTRODUCTION AND SUMMARY**

6 1. The popular retailer Sierra Trading Post engages in false and misleading
7 advertising which harms Washington State consumers.

8 2. Defendant Sierra Trading Post, Inc. ("Sierra Trading Post"), is a discount retailer
9 which sells men's and women's apparel, outdoor gear, sporting goods and home fashions directly
10 to consumers. While Sierra Trading Post operates about 30 brick-and-mortar retail stores
11 nationwide (including two Washington State stores, in Bellingham and Silverdale), Sierra Trading
12 Post generates the bulk of its revenues through sales on its website and from its downloadable
13 mobile application ("mobile app"), which are utilized by consumers nationwide, including in
14 Washington State.

15 3. When customers visit the website www.sierratradingpost.com or browse using the
16 Sierra Trading Post downloadable mobile app, the customers see clothes, camping gear and
17 outdoor apparel being sold for what Sierra Trading Post claims is a significant discount.

18 4. Sierra Trading Post makes ubiquitous use of "reference prices," which are the
19 prices by which the retailer communicates the former price or value of the product, and thus the
20 size of the discount being offered.

21 5. Almost every item offered by Sierra Trading Post on its website, through its
22 mobile app, and in its retail stores is advertised using a reference price (variously called the
23 "Compare at" price or the "retail price)." But most of the reference prices displayed by Sierra
24 Trading Post are false, deceptive or misleading because the reference prices are not the former
25 price or market price of that particular product being sold.

26 6. For example, but without limitation, Sierra Trading Post's advertising contains
27 reference prices which are not the price at which that same item was offered or sold in appropriate
28 quantities by other retailers in the relevant market, and likewise are not Sierra Trading Post's

1 previous offering price for that item. In some instances, Sierra Trading Post's reference prices are
2 estimates, lack evidence, or are simply made up. Many items have never been sold at the
3 reference price from which the item is supposedly discounted.

4 7. Sierra Trading Post claims and represents to consumers that it is able to offer such
5 terrific "deals," as represented by discounts from its reference prices, because it supposedly buys
6 excess inventory from other retailers or manufacturers at cut-rate prices. "So when a
7 manufacturer overproduces or other stores overbuy, we swoop in, negotiate the lowest possible
8 price, and pass the savings on!"¹ Sierra Trading Post identifies most of the products it offers as a
9 supposed "Closeout," which Sierra Trading Post defines as being "last year's model or color...
10 Closeouts are often a high percentage off the retail price."

11 8. But this carefully crafted image of a discounter who primarily sells close-outs and
12 excess inventory which were previously offered by other retailers at the advertised "retail price"
13 or "Compare at" price, is a lie. For example, Sierra Trading Post is still offering on its website, 3
14 years later, the very same Marmot Optima Gore-Tex PacLite Jacket that Plaintiff Weimin Chen
15 purchased on the Sierra Trading Post website in November 2015. And Sierra Trading Post is still,
16 3 years later, falsely advertising the jacket as a "Closeout" which was "last year's model or
17 color." Meanwhile, Sierra Trading Post deceptively advertises such items by displaying reference
18 prices at which no retailer has offered the products in the recent past.

19 9. In fact, many if not most of the products offered by Sierra Trading Post were
20 specially ordered by and exclusively manufactured for Sierra Trading Post, and have never been
21 offered by other retailers at all, let alone at the invented "Compare at" or "retail" reference price.

22 10. Sierra Trading Post also advertises many products by displaying the reference
23 price of similarly styled but in fact different and often higher quality products (e.g., Sierra
24 Trading Post's lower-priced products may have lower quality materials and workmanship). These
25 are unlawful apples-to-oranges comparisons.

26
27
28 ¹ See "Sierra Trading Post: How we do it" at <https://www.sierratradingpost.com/lp2/how-we-do-it>.

11. Sierra Trading Post's fraudulent advertising scheme harms Washington consumers like Plaintiff Weimin Chen by causing them to pay more than they otherwise would have paid and to buy more than they otherwise would have bought. Customers do not enjoy the actual discounts Sierra Trading Post promised them, and the items are not in fact worth the amount that Sierra Trading Post represents to them.

12. Sierra Trading Post's false reference price advertising also harms all of its customers by fraudulently increasing demand for all of its products, enabling Sierra Trading Post to charge all of its customers higher prices than it otherwise could have charged for its products and to generate more sales that it otherwise would have generated.

13. Fortunately for Washington State consumers, the Court has been equipped by the Legislature with multiple tools for remedying Sierra Trading Post's unlawful behavior. In addition to actual damages (which can be trebled) and attorneys' fees and court costs, this Court can and should enter a permanent injunction which polices Sierra Trading Post's use of reference prices in its advertising.

15 **II. PARTIES**

14. Plaintiff Weimin Chen is a citizen of the United States of America and an individual and a natural adult person who currently resides and who at all relevant times in the past resided in the City of Bellevue, King County, Washington State.

15. Defendant Sierra Trading Post, Inc., is a corporation chartered under the laws of the State of Wyoming which currently has and at all relevant times in the past has had its headquarters, executive office, principal place of business or nerve center in Laramie County, State of Wyoming.

16. Defendants Doe 1 through Doe 20, inclusive, aided and/or abetted Defendant Sierra Trading Post, Inc., in such a manner that Doe 1 through Doe 20, inclusive, are each directly, contributorily, vicariously, derivatively and/or otherwise liable for the acts or omissions of Defendant Sierra Trading Post, Inc. Plaintiff is currently unaware of the true identities of Doe 1 through Doe 20, inclusive; Plaintiff anticipates that, upon learning the true identities of any of

1 Doe 1 through Doe 20, inclusive, Plaintiff will either freely amend the operative complaint or
2 request leave from the Court to amend the operative complaint.

3 **III. JURISDICTION AND VENUE**

4 17. This Court has subject matter jurisdiction over this civil action pursuant to,
5 without limitation, Section 6 of Article IV of the Washington State Constitution (Superior Court
6 jurisdiction, generally), Section 7.24.146 of the Revised Code of Washington (court of record
7 jurisdiction over prayers for declaratory relief) and Section 19.86.090 of the Revised Code of
8 Washington (Superior Court jurisdiction over Consumer Protection Act claims).

9 18. This Court has personal jurisdiction over each of the defendants pursuant to,
10 without limitation, Revised Code of Washington section 4.28.185. Defendant Sierra Trading Post,
11 Inc., has, without limitation, transacted business within the State of Washington (including,
12 without limitation, operating the www.sierratradingpost.com website and mobile app and operating
13 brick-and-mortar Sierra Trading Post stores in Bellingham, Washington, and in Silverdale,
14 Washington), and/or has committed tortious acts within the State of Washington (as alleged,
15 without limitation, throughout this Complaint).

16 19. With regard to the cause of action brought pursuant to the Washington Consumer
17 Protection Act, this Court has personal jurisdiction over each of the defendants pursuant to
18 Revised Code of Washington section 19.86.160. Defendant Sierra Trading Post, Inc., has engaged
19 in conduct in violation of Chapter 19.86 of the Revised Code of Washington which has had an
20 impact in Washington State which said chapter reprehends.

21 20. Venue is proper in King County Superior Court because, without limitation,
22 Plaintiff resides in King County; a significant portion of the acts giving rise to this civil action
23 occurred in King County; Defendant Sierra Trading Post, Inc., intended to and did have a
24 substantial and foreseeable effect on trade or commerce in King County; the acts and omissions
25 of Defendant Sierra Trading Post, Inc., pled herein affected the prices advertised and paid and the
26 volume of sales or revenues obtained from King County; and/or Defendant Sierra Trading Post,
27
28

1 Inc., knew or expected that their advertisements would be seen and/or acted upon inside King
2 County.

3 21. Within the jurisdiction of King County Superior Court, this civil action is assigned
4 to the Seattle Case Assignment Area because, without limitation, no defendant resides for these
5 purposes in King County, and Plaintiff resides in the City of Bellevue, King County.

6 **IV. PLAINTIFF'S FACTUAL ALLEGATIONS**

7 22. Plaintiff Weimin Chen has purchased many products from Sierra Trading Post,
8 always through the www.sierratradingpost.com website.

9 23. From December 1, 2010, through January 19, 2018, Mr. Chen placed 34 orders for
10 90 separate items, spending a total of \$3,314.46. Sierra Trading Post advertised and promised Mr.
11 Chen that the 90 items were discounted an average of 60% from their regular prices, aggregating
12 to a collective total advertised savings of \$4,722.32.

13 24. For example, on May 2, 2015, Mr. Chen placed order number E25072854 on the
14 Sierra Trading Post website for the following 5 items:

- 15 • Montrail Fairhaven Trail Running Shoes (For Men) Item #5528N-01-9.5-M
- 16 • The North Face Greenwater Sport Sandals (For Men) Item #6403C-01-12-M
- 17 • The North Face Horizon Betty Capris (For Women) Item #6405J-04-2-R
- 18 • Adidas Swim Shirt - Short Sleeve (For Men) Item #9094P-01-L
- 19 • New Balance 610V3 Trail Running Shoes (For Men) Item #8388D-02-11.5-2E

20 Sierra Trading Post offered these 5 items for a total of \$128.21, at an advertised dollar amount
21 "savings" of \$230.74 and at an advertised 64% off.

22 25. For example, on November 1, 2015, Mr. Chen placed order number E27183533 on
23 the Sierra Trading Post website for the following 3 items:

- 24 • Marmot Optima Gore-Tex® PacLite® Jacket - Waterproof (For Men), Item
25 #3969D-07-M
- 26 • Carhartt Tipton Jeans - Relaxed Fit, Straight Leg, Factory Seconds (For Men),
27 Item #8744P-01-32-30
- 28 • Zoot Sports Solana Running Shoes (For Men), Item #9212K-01-11-M

Sierra Trading Post offered these 3 items for a total of \$144.78, at an advertised dollar amount
"savings" of \$185.21 and at an advertised 56% off.

1 26. For example, on November 15, 2015, Mr. Chen placed order number E27383630
2 on the Sierra Trading Post website for the following 3 items:

- 3 • Mizuno Wave Paradox Running Shoes (For Men), Item #9825P-01-12-2E
4 • Mizuno Wave Hayate Trail Running Shoes (For Women), Item #9825T-01-7-B
5 • Mizuno Wave Creation 16 Running Shoes (For Women), Item #9825R-01-6.5-B

6 Sierra Trading Post offered these 3 items for a total of \$139.88, at an advertised dollar amount
7 “savings” of \$265.09 and at an advertised 65% off.

8 27. For each of the 90 items in these 34 orders, Mr. Chen viewed and relied on Sierra
9 Trading Post’s reference price and discount percentage representations, including: (1) the
10 “Compare at \$xx” reference price representations on the list pages containing multiple products;
11 (2) the “Compare at \$xx” and “Save xx%” representations on the individual product webpages;
12 (3) the “Save xx%” discount representations in the shopping cart; and (4) the “Your savings so
13 far: \$xxx.xx (xx%) on this order compared to retail prices!” dollar and percentage claimed
14 discounts.

15 28. Mr. Chen reasonably believed and understood that the advertised higher reference
16 price, i.e., the “Compare at \$xx” price, and the advertised dollar and percentage savings from that
17 reference price, represented the price at which that *specific item* (and not a different or supposedly
18 similarly styled item) was currently or in the recent past offered by representative retail stores in
19 the local marketplace or by Sierra Trading Post itself.

20 29. With regard to all of his purchases from Sierra Trading Post, Mr. Chen believed
21 and understood the reference prices and the “Compare at” and “retail price” terminology to be
22 truthful, consistent and lawful.

23 30. Contrary to Sierra Trading Post’s representations, for at least some of the items
24 purchased by Mr. Chen, the items were never previously offered by any retailer at the reference
25 price. For at least some of the items purchased by Mr. Chen, no retailer offered the items for sale
26 at the reference price in an appropriate quantity and/or for an appropriate duration. For at least
27 some of the items purchased by Mr. Chen, the reference prices were estimates or simply made up.
28

1 31. The advertised reference prices and discounts were material representations and
2 inducements to Mr. Chen's purchase of the allegedly discounted products and to Mr. Chen's
3 decision to become a repeat customer of Sierra Trading Post.

4 32. Mr. Chen reasonably relied on Sierra Trading Post's material misrepresentations
5 concerning the purported discounts on, and the nature of, these items.

6 33. If Mr. Chen had known the truth, he would have acted differently.

7 34. The false or misleading nature of Sierra Trading Post's discounts and reference
8 pricing was, at all relevant times, masked or concealed or hidden such that an ordinary consumer
9 exercising reasonable care under all of the circumstances would not have known of or discovered
10 their false or misleading nature.

11 35. As a direct and proximate result of Sierra Trading Post's acts and omissions, Mr.
12 Chen was harmed, suffered an injury in fact and has lost money or property.

13 36. Sierra Trading Post's false discount advertising harmed Mr. Chen by causing him
14 to pay more than he otherwise would have paid and to buy more than he otherwise would have
15 bought. Mr. Chen did not enjoy the actual discounts Sierra Trading Post promised him, and the
16 items were not in fact worth the amount that Sierra Trading Post had represented to him.

17 37. Sierra Trading Post's false reference pricing scheme harmed all of its customers by
18 fraudulently increasing demand for all of its products, enabling Sierra Trading Post to charge all
19 of its customers higher prices than it otherwise could have charged for its products and to
20 generate more sales that it otherwise would have generated.

21 38. Mr. Chen has a legal right to rely, now and in the future, upon the truthfulness and
22 accuracy of Sierra Trading Post's representations regarding discounts or reference prices. Mr.
23 Chen will be harmed if, in the future, Mr. Chen is left to guess as to whether Sierra Trading Post
24 is providing accurate reference prices and stated discounts.

25 39. If Mr. Chen were to order again from Sierra Trading Post without Sierra Trading
26 Post changing the unlawful conduct alleged herein, Mr. Chen would be harmed on an ongoing
27 basis and/or would be harmed once or more or on an ongoing basis in the future.

28

1 40. On July 27, 2018, Mr. Chen served a pre-litigation notice letter upon Sierra
2 Trading Post, Inc., detailing his allegations and demanding that Sierra Trading Post take
3 corrective action within 30 days.

4 41. Sierra Trading Post received the pre-litigation notice letter on July 30, 2018. In the
5 thirty calendar days following July 30, 2018, Sierra Trading Post did not comply with any of the
6 demands made in Mr. Chen's letter.

7 42. At all relevant times, Plaintiff Chen had no knowledge of the existence or content
8 of Sierra Trading Post's Terms of Use.

9 43. Plaintiff Chen never assented or agreed to Sierra Trading Post's Terms of Use.

10 44. At all relevant times, Mr. Chen did not see or know of the existence of Sierra
11 Trading Post's "Comparison Pricing" disclosure.

12 45. Plaintiff Chen brings each cause of action in this Complaint on behalf of himself
13 individually, on behalf of the Class (defined below) and as a private attorney general on behalf of
14 the general public.

15 **V. REFERENCE PRICING OVERVIEW**

16 46. A "reference price" is a stated price presented alongside the retailer's actual
17 offering price, which retailers use to convince consumers that they are getting a good deal.

18 47. Over the past forty years, a substantial body of research on the effects of reference
19 prices (also referred to in the relevant literature as "advertised reference prices," "external
20 reference prices" and "comparative prices") shows that reference prices: (i) impact consumers'
21 perceptions of the value of the sales deal; (ii) impact consumers' willingness to make the
22 purchase; (iii) decrease consumers' intentions to search for a lower price; and (iv) allow sellers
23 that utilize reference prices to charge higher prices and make increased sales. Consumers form an
24 "internal reference price," also known as an "expected price," an "aspirational price" (a price the
25 consumer would like to pay) or a "normative price" (a price that is "fair"). Consumers store and
26 retrieve the "internal reference price" from memory to judge the merits of a specific price offer.
27 Even where an advertised reference price is exaggerated and not itself completely believed,
28

1 perceptions of value increase in comparison to a promotion with no advertised reference price.
 2 Thus, retailers' use of reference prices influences consumers' "internal reference price" and
 3 subsequently, increases consumers' willingness to purchase the product.²

4 48. When a reference price is bona fide and truthful, it may help consumers in making
 5 informed purchasing decisions. In contrast, consumers are harmed when merchants advertise their
 6 products with inflated and false reference prices, because the false reference prices deceive
 7 consumers, deprive consumers of a fair opportunity to accurately evaluate the offer, and result in
 8 purchasing decisions based on false pretenses.

9 49. False reference pricing causes consumers to pay more than they otherwise would
 10 have paid for products. False reference pricing also fraudulently increases consumer demand for
 11 products, enabling retailers to charge higher prices than they otherwise could have charged.

12 50. Beyond the adverse impact upon consumers' welfare, the practice of employing
 13 false reference pricing also negatively affects the integrity of competition in retail markets. A
 14 retailer's use of false reference prices constitutes an unfair method of competition, injuring honest
 15 competitors that sell the same or similar products, or otherwise compete in the same market, using
 16 valid and accurate reference prices. Businesses who play by the rules — and the investors in those
 17 businesses — are penalized if the unlawful advertising practices of their competitors go
 18 unchecked.

19
 20 ² See, e.g., Rajesh Chandrashekar & Dhruv Grewal, *Assimilation of Advertised Reference*
 21 *Prices: The Moderating Role of Involvement*, 79 J. Retailing 53 (2003); Pilsik Choi & Keith S.
 22 *Coulter, It's Not All Relative: The Effects of Mental and Physical Positioning of Comparative*
 23 *Prices on Absolute Versus Relative Discount Assessment*, 88 J. Retailing 512 (2012); Larry D.
 24 *Compeau & Dhruv Grewal, Comparative Price Advertising: An Integrative Review*, 17 J. Pub.
 25 *Pol'y & Mktg.* 257 (1998); Larry D. Compeau, Dhruv Grewal & Rajesh Chandrashekar,
 26 *Comparative Price Advertising: Believe It or Not*, 36 J. Consumer Aff. 284 (2002); David
 27 *Friedman, Reconsidering Fictitious Pricing*, 100 Minn. L. Rev. 921 (2016); Dhruv Grewal &
 28 *Larry D. Compeau, Consumer Responses to Price and its Contextual Information Cues: A*
Synthesis of Past Research, a Conceptual Framework, and Avenues for Further Research, in 3
Rev. of Mktg. Res. 109 (Naresh K. Malhotra ed., 2007); Daniel J. Howard & Roger A. Kerin,
Broadening the Scope of Reference Price Advertising Research: A Field Study of Consumer
Shopping Involvement, 70 J. Mktg. 185 (2006); Aradhna Krishna, Richard Briesch, Donald R.
Lehmann & Hong Yuan, A Meta-Analysis of the Impact of Price Presentation on Perceived
Savings, 78 J. Retailing 101 (2002); Balaji C. Krishnan, Sujay Dutta & Subhash Jha,
Effectiveness of Exaggerated Advertised Reference Prices: The Role of Decision Time Pressure,
 89 J. Retailing 105 (2013); and Tridib Mazumdar, S. P. Raj & Indrahit Sinha, *Reference Price*
Research: Review and Propositions, 69 J. Mktg. 84 (2005).

1 **VI. LAWS PROHIBITING FALSE REFERENCE PRICING**

2 51. "The [Consumer Protection Act], first enacted in 1961, is Washington's principal
3 consumer protection and antitrust statute. The consumer protection provisions of the CPA were
4 modeled after Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45." Washington
5 Pattern Jury Instruction No. 310.00 (Consumer Protection Act — Introduction).

6 52. The Washington Consumer Protection Act is codified as Chapter 19.86 of the
7 Revised Code of Washington. Its principal substantive provision declares unfair methods of
8 competition and unfair or deceptive acts or practices to be unlawful. RCW 19.86.020. "Private
9 rights of action may now be maintained for recovery of actual damages, costs, and a reasonable
10 attorney's fee. RCW 19.86.090. A private plaintiff may be eligible for treble damages ... Private
11 consumers may obtain injunctive relief, even if the injunction would not directly affect the
12 individual's own rights. RCW 19.86.090." Washington Pattern Jury Instruction No. 310.00
13 (Consumer Protection Act — Introduction).

14 53. The Washington Legislature has declared the purpose and intent of the Consumer
15 Protection Act: "The legislature hereby declares that the purpose of this act is to complement the
16 body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and
17 fraudulent acts or practices in order to protect the public and foster fair and honest competition. It
18 is the intent of the legislature that, in construing this act, the courts be guided by final decisions of
19 the federal courts and final orders of the federal trade commission interpreting the various federal
20 statutes dealing with the same or similar matters ..." RCW 19.86.920.

21 **A. Advertising The Former Price Charged By That Retailer For That Same**
22 **Product.**

23 54. With regard to the practice of a retailer advertising the former price charged by
24 that retailer for that same product, the Federal Trade Commission ("FTC") states:

25 One of the most commonly used forms of bargain advertising is to offer a
26 reduction from the advertiser's own former price for an article. If the former price
27 is the actual, bona fide price at which the article was offered to the public on a
28 regular basis for a reasonably substantial period of time, it provides a legitimate
basis for the advertising of a price comparison. Where the former price is genuine,
the bargain being advertised is a true one. If, on the other hand, the former price
being advertised is not bona fide but fictitious -- for example, where an artificial,

1 inflated price was established for the purpose of enabling the subsequent offer of a
 2 large reduction -- the "bargain" being advertised is a false one; the purchaser is not
 3 receiving the unusual value he expects. In such cases, the 'reduced price' is, in
 reality, probably just the seller's regular price.

4 16 C.F.R § 233.1(a) (Emphasis added).

5 55. When a retailer is advertising its own former price for that same product, the
 6 retailer may lawfully advertise or display the former price with a slash through it, the percentage
 7 of discount (e.g., "xx% OFF") or statements such as "You Save: \$xx" or "You Save: xx%." See,
 8 e.g., WAC § 308-66-152 (regulation, promulgated under the Consumer Protection Act, regarding
 9 the advertising of former prices of cars).

10 **B. Advertising The Price Charged By Other Retailers For That Same Product.**

11 56. With regard to the practice of a retailer advertising, as the reference price, the price
 12 charged by other retailers for that same product, the Federal Trade Commission states:

13 (a) Another commonly used form of bargain advertising is to offer goods at prices
 14 lower than those being charged by others for the same merchandise in the
 advertiser's trade area (the area in which he does business). This may be done
 15 either on a temporary or a permanent basis, but in either case the advertised higher
 price must be based upon fact, and not be fictitious or misleading. Whenever an
 16 advertiser represents that he is selling below the prices being charged in his area
 for a particular article, he should be reasonably certain that the higher price he
 17 advertises does not appreciably exceed the price at which substantial sales of the
 18 article are being made in the area - that is, a sufficient number of sales so that a
 consumer would consider a reduction from the price to represent a genuine bargain
 or saving. Expressed another way, if a number of the principal retail outlets in the
 19 area are regularly selling Brand X fountain pens at \$10, it is not dishonest for
 20 retailer Doe to advertise: "Brand X Pens, Price Elsewhere \$10, Our Price \$7.50".

21 (b) The following example, however, illustrates a misleading use of this
 22 advertising technique. Retailer Doe advertises Brand X pens as having a "Retail
 Value \$15.00, My Price \$7.50," when the fact is that only a few small suburban
 23 outlets in the area charge \$15. All of the larger outlets located in and around the
 main shopping areas charge \$7.50, or slightly more or less. The advertisement here
 24 would be deceptive, since the price charged by the small suburban outlets would
 have no real significance to Doe's customers, to whom the advertisement of
 25 "Retail Value \$15.00" would suggest a prevailing, and not merely an isolated and
 unrepresentative, price in the area in which they shop.

26 16 C.F.R § 233.2(a),(b) (Emphasis added.).
 27
 28

57. When a retailer is advertising the price charged by other retailers for the same product, the retailer may lawfully use the terms "Compare" or "Compare at" in its advertising. *See, e.g., People v. Overstock.Com., Inc.*, 12 Cal. App. 5th 1064, 1080 (2017).

C. Advertising The Price Charged By That Retailer Or Other Retailers For A Similar Quality But Different Product.

58. With regard to the practice of a retailer advertising, as the reference price, the price charged by that retailer or other retailers for a similar quality but different product, the Federal Trade Commission states:

A closely related form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality - in other words, comparable or competing merchandise - to that being advertised. Such advertising can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area. The advertiser should, however, be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area. For example, retailer Doe advertises Brand X pen as having "Comparable Value \$15.00". Unless a reasonable number of the principal outlets in the area are offering Brand Y, an essentially similar pen, for that price, this advertisement would be deceptive.

16 C.F.R § 233.2(c) (Emphasis added).

59. When a retailer is advertising the price charged for a similar quality but different product, the retailer may lawfully use a term like "Compare Similar" which signals the nature of the comparison. *See People v. Overstock.Com., Inc.*, 12 Cal. App. 5th 1064, 1080 (2017). However, in such a situation, the retailer is engaging in false, deceptive or misleading advertising if the retailer uses the terms "Compare" or "Compare at," which the ordinary consumer exercising reasonable care would instead understand to mean the former price for that identical product. *Ibid.* *See also* WAC § 246-881-020 (regulation, promulgated under the Consumer Protection Act, forbidding the advertising of generic drugs in any manner which implies that the brand name drug is being offered for sale).

60. Courts have acknowledged the misleading effect that false reference prices have on customers. For example, the Ninth Circuit in *Hinojos v. Kohl's Corp.*, explained:

1 Most consumers have, at some point, purchased merchandise that was marketed as
2 being "on sale" because the proffered discount seemed too good to pass up.
3 Retailers, well aware of consumers' susceptibility to a bargain, therefore have an
4 incentive to lie to their customers by falsely claiming that their products have
5 previously sold at a far higher "original" price in order to induce customers to
6 purchase merchandise at a purportedly marked-down "sale" price. Because such
7 practices are misleading — and effective — the California legislature has
8 prohibited them.

6 718 F.3d 1098, 1101, 1105-06 (9th Cir. 2013) (citing Dhruv Grewal & Larry D. Compeau,
7 *Comparative Price Advertising: Informative or Deceptive?*, 11 J. of Pub. Policy & Mktg. 52, 55
8 (Spring 1992)).

9 61. (To be clear, Plaintiff Chen is bringing all of his claims in this Complaint under
10 state law. He is bringing no claims under federal law, which is being cited, as per RCW
11 19.86.920, for purposes of interpretation.)

12 **VII. COMMON FACTUAL ALLEGATIONS OF SIERRA TRADING POST'S**
13 **UNLAWFUL SCHEME**

14 62. Defendant Sierra Trading Post, Inc. ("Sierra Trading Post"), is a discount retailer
15 which sells men's and women's apparel, outdoor gear, sporting goods and home fashions directly
16 to consumers. While Sierra Trading Post operates about 30 brick-and-mortar retail stores
17 nationwide (including two Washington State stores, in Bellingham and Silverdale), Sierra Trading
18 Post generates the bulk of its revenues through its website and from its downloadable mobile app.

19 63. Sierra Trading Post ships more than 7 million pieces of merchandise each year.
20 Sierra Trading Post ships more than 7,000 items per day and, during the Christmas season, more
21 than 20,000 items per day. At a minimum, about 2.27% of Sierra Trading Post's sales were made
22 to consumers in Washington State (reflecting the fact, according to the Census Bureau, that
23 Washington's 2017 population of 7,405,743 represents 2.27% of the United States' 2017
24 population of 325,719,178). In reality, the percentage of Sierra Trading Post's customers who are
25 Washington State residents is higher due to the outdoor lifestyle and relative affluence of
26 Washingtonians.

1 64. When customers visit the website www.sierratradingpost.com or browse the Sierra
2 Trading Post mobile app, they see clothes, camping gear and outdoor apparel being sold for what
3 Sierra Trading Post claims is a significant discount.

4 65. Sierra Trading Post makes ubiquitous use of “reference prices,” which are the
5 prices by which the retailer communicates the former price or value of the product, and thus the
6 size of the discount being offered. Almost every item offered by Sierra Trading Post on its
7 website, through its mobile app, and in its retail stores is advertised using a reference price.

8 66. Sierra Trading Post claims and represents to consumers that it is able to offer such
9 terrific “deals,” as represented by discounts from its reference prices, because it primarily buys
10 excess inventory from other retailers or manufacturers at cut-rate prices. On a page on its website
11 called “Sierra Trading Post: How we do it”, available at
12 <https://www.sierratradingpost.com/lp2/how-we-do-it>, Sierra Trading Post spins the tale. “So
13 when a manufacturer overproduces or other stores overbuy, we swoop in, negotiate the lowest
14 possible price, and pass the savings on!” “Never the same selection twice.” *Id.* “The store
15 managers don’t even know what’s coming until they throw open the delivery truck doors!” *Id.*
16 Sierra Trading Post identifies most of the products it offers as a supposed “Closeout,” which
17 Sierra Trading Post defines as being “last year’s model or color... Closeouts are often a high
18 percentage off the retail price.”

19 67. But this carefully crafted image of a discounter who primarily sells close-outs and
20 excess inventory which were previously and regularly sold at the advertised “retail price” or
21 “Compare at” reference price is a lie.

22 68. Sierra Trading Post engages in at least four distinct but interrelated forms of false
23 advertising with regard to its reference prices.

24 69. **False Reference Prices In General.** Almost every item sold by Sierra Trading
25 Post in its retail stores, on its website and through its mobile app is advertised using a reference
26 price. But most of the reference prices displayed by Sierra Trading Post are false, deceptive or
27 misleading in the sense that the reference prices are not the former price, market price, or value of
28 that particular product being sold. For example, but without limitation, Sierra Trading Post’s

1 advertising contains reference prices which are not the price at which that same item was sold in
2 appropriate quantities by other retailers in the relevant market or in the past by Sierra Trading
3 Post. In some instances, Sierra Trading Post's reference prices are estimates, lack evidence, or are
4 simply made up. Certain items have never been offered or sold at the price from which the item is
5 supposedly discounted.

6 **70. Exclusive, Specially Manufactured Items With False Reference Prices.** Certain
7 products are specially ordered by and exclusively manufactured for Sierra Trading Post and are
8 only available for purchase from Sierra Trading Post. Sierra Trading Post advertises some of
9 these items by displaying reference prices at which Sierra Trading Post never offered the items
10 and/or did not offer the items for an appropriate quantity or for an appropriate period of time.

11 **71. Reference Prices Using Different-Quality Comparisons.** Sierra Trading Post
12 advertises certain products by displaying the reference price of similarly styled but in fact
13 different and higher quality products (e.g., Sierra Trading Post's lower-priced products may have
14 lower quality materials and workmanship). These are unlawful apples-to-oranges comparisons.

15 **72. "Compare at" Ambiguity.** Sierra Trading Post uses the term "Compare at" to
16 advertise almost every item for sale on its website and mobile app. By law, the term "Compare
17 at" must refer to the former price or market price for *that exact same item*. But Sierra Trading
18 Post uses the term indiscriminately and deceptively. Sometimes, as noted above, Sierra Trading
19 Post uses "Compare at" to refer to a price at which the item was never offered or was not offered
20 in an appropriate quantity for an appropriate period of time. Sometimes, Sierra Trading Post uses
21 "Compare at" to refer to a price at which another retailer may have offered a similar-looking but
22 different and typically higher-quality product, in comparison to the lower-quality product being
23 offered by Sierra Trading Post. It is impossible for an ordinary consumer exercising reasonable
24 care to know what "Compare at" means with regard to any particular item; Sierra Trading Post's
25 use of "Compare at" is hopelessly confusing. Sierra Trading Posts' hidden "Comparison Pricing"
26 disclosure, even if it were seen by a consumer, is no help to the consumer, because it defines
27 "Compare at" and "retail price" in such an unnatural way as to render the terms virtually
28 meaningless because they can refer to multiple different types of comparisons.

73. The site's standard practice is to display the price of a product in prominent black print and then to display, to the right of the price, a statement in smaller light-gray font which reads "Compare at" followed by a price. The "Compare at" price is always substantially higher than the price at which the Sierra Trading Post website is offering the product for sale. This is an example taken from the Sierra Trading Post website on October 1, 2018:



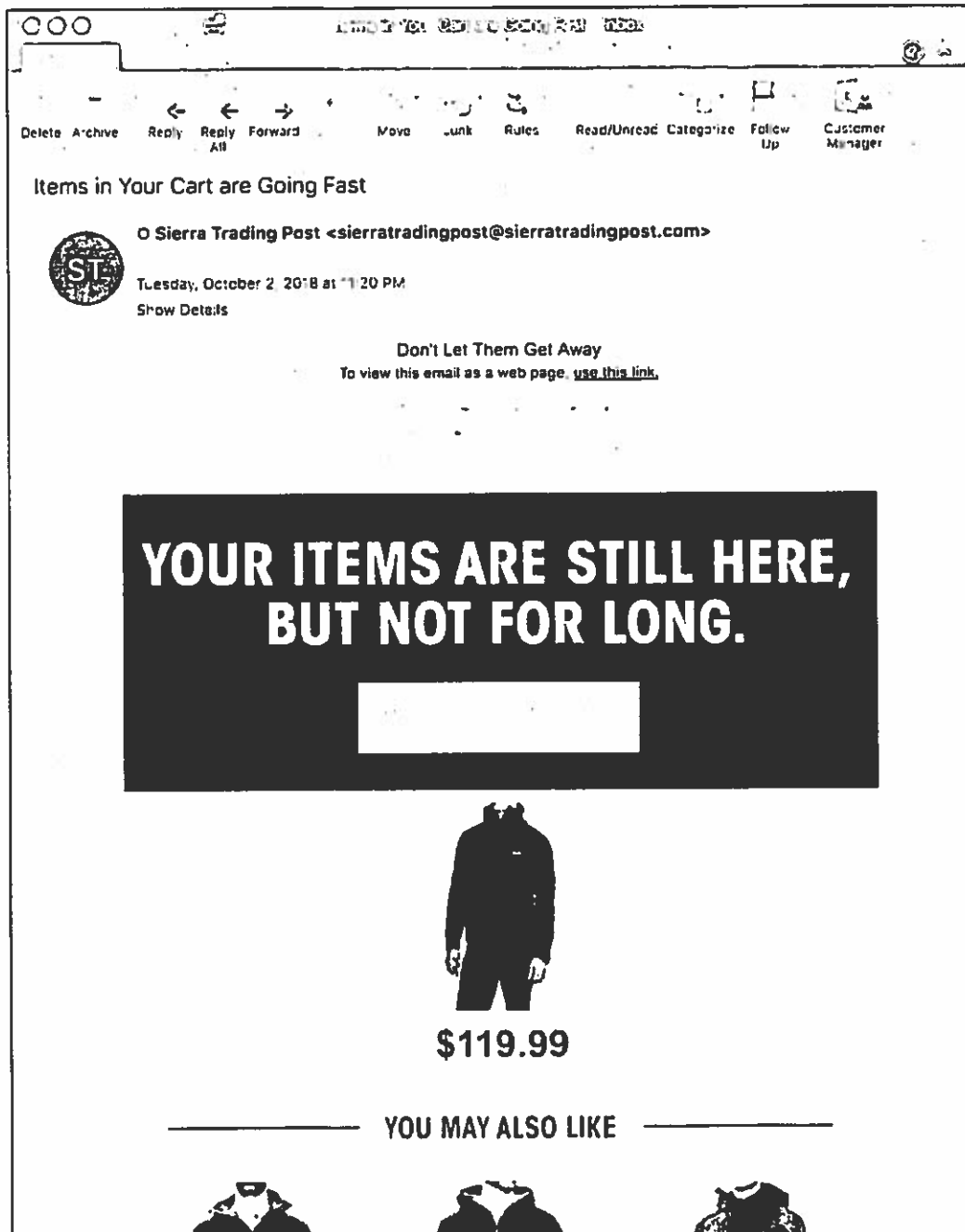
74. When a customer clicks on one specific product on the website or the mobile app, that product's individual page appears. To the right of the product is a line which provides the current price, which is followed by the phrase "Save xx%", which is followed by the phrase in black normal text "Compare at \$xx.xx." Most items are also described as "Closeouts" which are "last year's model or color" that are "a high percentage off retail prices." Below is an example taken from the Sierra Trading Post website on October 1, 2018:



75. Despite Sierra Trading Post's representations to the contrary, this item, as is typical of other offerings on the website, was not previously offered at the (\$200.00) reference price in the recent past if ever, and is not a "Closeout" which is "last year's model or color." This identical Marmot Optima Gore-Tex PacLite Jacket was purchased 3 years earlier by Plaintiff Weimin Chen from Sierra Trading Post's website, and has been perpetually, and exclusively, offered by Sierra Trading Post since then as a continually stocked product, always offered far below \$200.00. Sierra Trading Post's representations that the jacket was previously and regularly sold at the advertised \$200.00 "retail price" or "Compare at" reference price is a lie. After a customer adds a product to the online shopping cart, Sierra Trading Post continues to make false representations that the advertised reference prices represent the retail price at which the product was regularly offered. During shopping cart check-out process, Sierra Trading Post states: "Your savings so far: \$xx.xx (xx%) on this order compared to retail prices!" Below is a shopping cart example taken from the Sierra Trading Post website on October 1, 2018:

The screenshot shows the Sierra Trading Post website's shopping cart interface. At the top, there's a navigation bar with links for 'My Account', 'Stores', 'Help', and '1 Items'. Below this is a search bar and a category menu including 'NEW', 'MEN', 'WOMEN', 'KIDS', 'SHOES', 'GEAR', 'HOME & PET', 'GIFTS', and 'CLEARANCE'. The main content area is titled 'Shopping Cart (1)' and lists the item 'Marmot Optima Gore-Tex PacLite Jacket - Waterproof (For Men)' with a price of \$119.99. Below the item list, there's a summary section showing 'Order Sub total: \$119.99', 'Shipping Estimate: \$13.95', 'Tax: not yet calculated', and 'Order Total: \$133.94'. A 'Proceed to Checkout' button is prominently displayed. The page also includes a promotional message about free shipping with code SHIP89 and a 'Your savings so far' section indicating a 40% discount compared to retail prices.

76. If the consumer leaves a product in the shopping cart, then Sierra Trading Post sends a reminder email, urging the customer to quickly come back and purchase the item because the item is "Going Fast" and is "Still Here But Not For Long." See the email sent by Sierra Trading Post on October 2, 2018, below:



1 77. The representations and statements in this email that the product is "Going Fast"
2 and will be sold out soon are lies. In fact, this "Going Fast" item is the very same Marmot Optima
3 Gore-Tex PacLite Jacket that was purchased 3 years earlier by Plaintiff Weimin Chen from Sierra
4 Trading Post's website, and which has been continuously stocked and re-stocked by Sierra
5 Trading Post. Sierra Trading Post makes these false representations to buttress its carefully
6 crafted but false narrative that it is a discounter with limited-time clearance offerings of products
7 that it recently purchased at close-out from other retailers and manufacturers.

8 78. Unfortunately for Washington State consumers, the way in which Sierra Trading
9 Post is advertising its discounts is false, misleading or deceptive.

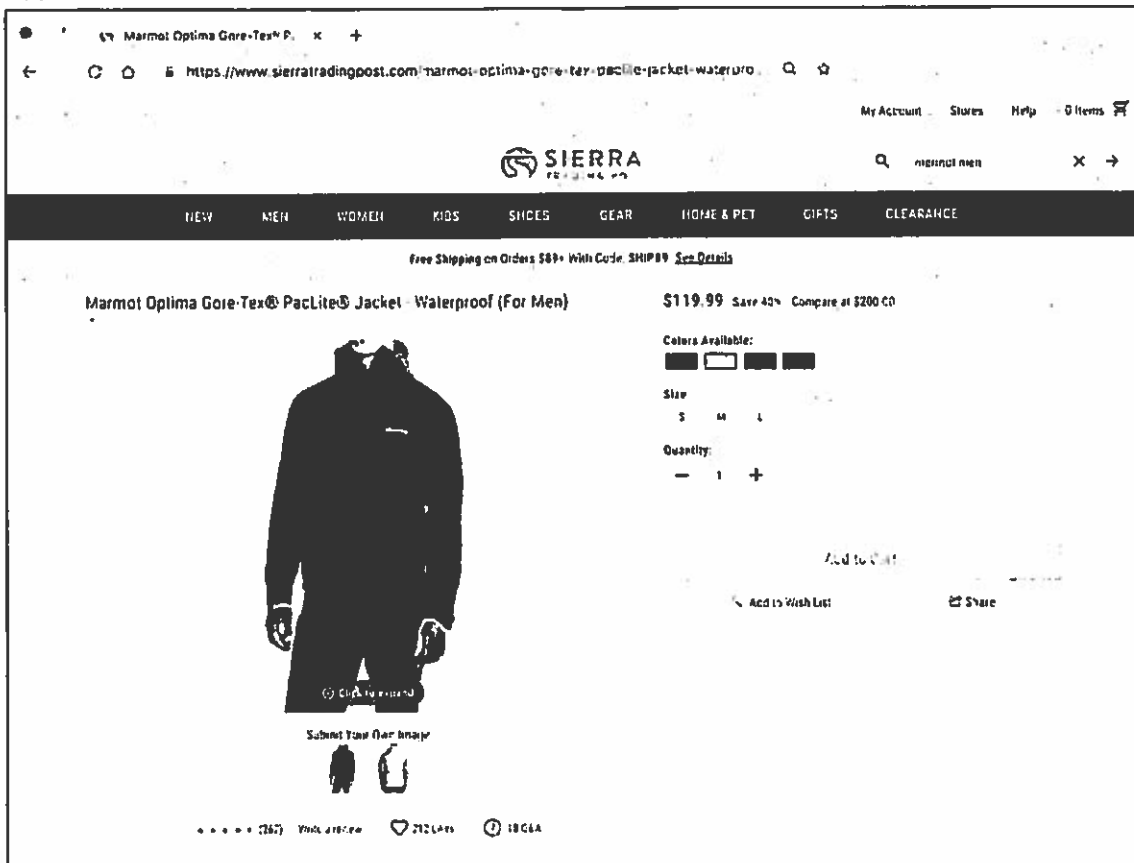
10 79. The law is simple and clear: If a retailer uses reference prices in its advertising
11 (which can include newspaper or television ads, price tags, in-store displays, or the text
12 promoting an item on the retailer's website or mobile app), then the reference prices cannot be
13 false, deceptive or misleading. But Sierra Trading Post has broken that law.

14 80. These many types of false or misleading reference prices used by Sierra Trading
15 Post permeate the customer experience, especially for customers who purchase products thought
16 the www.sierratradingpost.com website or the mobile app.

17 81. Based on information and belief, Sierra Trading Post engages in the same form of
18 false advertising in its retail stores, including its two retail stores in Washington State. For
19 example, and without limitation, the Sierra Trading Post stores prominently display signs offering
20 large but false, deceptive or misleading discounts from inflated reference prices which suffer
21 from the same or similar defects as do the online and mobile app advertisements.

22 82. Sierra Trading Post attempts to exculpate itself from its deceptive scheme with a
23 hidden disclaimer which is intentionally designed to ensure that no customers actually see it. The
24 disclaimer is accessible from only two places: (1) from the website footer, by clicking on a small
25 link labeled "Comparison Pricing" which is adjacent and buried next to 43 other similar looking
26 small links; and (2) from the individual product page, by clicking on plain black text labeled
27 "Compare at" adjacent to the price which gives absolutely no indication it is a hyperlink, but
28 when it is clicked, causes a popup dialog box to appear with a description of the comparison

pricing policy. Below is a screenshot demonstrating Sierra Trading Post's intentional hiding of the link to the comparison pricing policy on the individual product webpage taken on October 1, 2018 (the presentation is substantially similar on the desktop website, mobile website, and mobile app):



To the right of product, the price \$119.99 is listed in bold text. To the right of that, there is bold orange text stating "Save 40%". To the right of that is black, thin text stating "Compare at \$200.00."

83. There is absolutely no indication that the phrase "Compare at \$200.00" is a hyperlink (which when clicked opens a popup dialog box describing Sierra Trading Post's comparison pricing policy). The display of this "Compare at \$xxx.xx" hyperlink violates all Internet norms regarding the presentation of a hyperlink. The text is black, not blue or some other color. The text is not underlined. The text is not bolded. The hidden link is not presented with an

1 asterisk or other indicator that a click will lead to additional information, and is not presented
2 with an “i” or other graphic noting that additional information is available with a click. Sierra
3 Trading Post has intentionally designed this link to ensure that no ordinary consumer exercising
4 reasonable care would realize it was a hyperlink, let alone click on it. Discovery will show that
5 virtually no customers who purchase or have purchased products from Sierra Trading Post have
6 clicked on the hidden link let alone read the resulting pop-out dialog box. The hidden link appears
7 to be merely a bad-faith attempt by Sierra Trading Post to exculpate itself from its deceptive
8 pricing scheme.

9 84. Meanwhile, even if an ordinary consumer exercising reasonable care were to read
10 Sierra Trading Post’s comparison pricing definition, the consumer would still have no clear
11 understanding of what the “Compare at” and “retail price” reference price representations mean.
12 The pricing policy text is intentionally ambiguous. The hidden disclosure reads as follows:

13 Many of our price tags include comparison prices, which are references to regular
14 retail prices of the same or similar items at full-price department or specialty
15 retailers. Where identical items are not available, we compare to products of a
16 similar type, quality and style. Prices vary among other sellers and change over
17 time, but our buying staff’s goal is always to provide you with a useful comparison
18 based on prices at which we believe substantial sales of the same or a similar item
19 have been made at full-price department or specialty retailers in the area or online.
20 Our mission is always to bring you and your family exceptional value every day –
21 it is the foundation of our business.

22 85. Sierra Trading Post appears to be attempting to define “Compare at” and “retail
23 price” in such an unnatural way as to render the terms virtually meaningless. Sierra Trading Post
24 defines its reference pricing terms in a way contrary to the dictionary definitions of “Compare at”
25 and “retail price.” Sierra Trading Post’s comparison pricing policy is also directly contrary to the
26 standards and definitions in the FTC guidelines, by which the Washington State legislature has
27 stated that Washington courts should be guided when construing the Washington Consumer
28 Protection Act. *See* RCW 19.86.920; 16 C.F.R § 233.1 *et al.*

86. Just as virtually no consumers have knowledge of or view Sierra Trading Post’s
pricing policy disclosure, similarly very few (at best) who purchase products from Sierra Trading
Post’s website have knowledge of the existence or content of Sierra Trading Post’s Terms of Use.

1 Customers who purchase from the Sierra Trading Post mobile website or mobile app are not
2 presented with and are not required to assent to the Terms of Use. Customers who purchase from
3 the Sierra Trading Post desktop website do not assent to the Terms of Use because, without
4 limitation, the "browsewrap" Terms of Use provided by Sierra Trading Post to desktop website
5 users is inconspicuous, does not provide actual or constructive notice, and would not be seen by
6 the ordinary consumer exercising reasonable care.

7 87. The false discounts and false reference price representations by Sierra Trading
8 Post were material to Washington consumers' decision to purchase each product. Because of the
9 "Compare at" and "retail price" reference price representations and the stated percentage and
10 dollar discounts, Washington consumers reasonably believed they would be enjoying a significant
11 discount if they purchased these products, and consumers purchased these products from Sierra
12 Trading Post on the basis of these representations in order to enjoy the stated discounts.

13 88. Sierra Trading Post advertised inflated reference prices in order to make
14 consumers think the products were worth much more than they actually were. Sierra Trading Post
15 advertised fraudulent reference prices in order to trick its customers into paying more than they
16 otherwise would have paid.

17 89. Additionally, Sierra Trading Post falsely represented that it is a discounter who
18 primarily sells close-outs and excess inventory, in order to further deceive customers into
19 believing that its products were previously and/or regularly offered at the advertised "retail price"
20 or "Compare at" price.

21 90. The false or misleading nature of Sierra Trading Post's discounts and reference
22 pricing was, at all relevant times, masked or concealed or hidden such that an ordinary
23 Washington consumer exercising reasonable care under all of the circumstances would not have
24 known of or discovered their false or misleading nature.

25 91. As a direct and proximate result of Sierra Trading Post's acts and omissions, all
26 Washington consumers who have purchased a product from Sierra Trading Post that was
27 advertised by Sierra Trading Post with a false or misleading reference price or false percentage
28

1 and dollar amount discount have been harmed, have suffered an injury in fact and have lost
2 money or property.

3 92. Sierra Trading Post continues to display false reference prices and false percentage
4 and dollar amount discounts to this day. There is no reason to believe that Sierra Trading Post
5 will voluntarily and permanently cease its unlawful practices.

6 93. In acting toward Washington consumers and the general public in the manner
7 alleged herein, Sierra Trading Post acted with and was guilty of malice, fraud and/or oppression.

8 **VIII. CLASS ACTION ALLEGATIONS**

9 94. Plaintiff Chen brings this class-action lawsuit on behalf of himself and the
10 members of the following class (the "Class"):

11 **All persons who purchased in the State of Washington within the applicable**
12 **limitations period from Sierra Trading Post, Inc., one or more products**
13 **which Sierra Trading Post, Inc., advertised or promoted by displaying or**
14 **otherwise disseminating a reference price or discount.**

15 95. Specifically excluded from the Class are each defendant, any entity in which a
16 defendant has a controlling interest or which has a controlling interest in a defendant, a
17 defendant's agents and employees and attorneys, the bench officers to whom this civil action is
18 assigned, and the members of each bench officer's staff and immediate family.

19 96. *Numerosity.* Plaintiff does not know the exact number of Class members but is
20 informed and believes that the Class easily comprises 10,000 Washington State residents and
21 could, by the date of entry of Judgment, number in excess of 20,000 Washington State residents.
22 As such, Class members are so numerous that joinder of all members is impracticable.

23 97. *Commonality and predominance.* Well-defined, nearly identical legal or factual
24 questions affect the members of the Class. These questions predominate over questions that might
25 affect individual Class members. These common questions include, but are not limited to, the
26 following:

- 27 a. Sierra Trading Post's policies and actions regarding its use of reference
28 price advertising;
- b. The accuracy of Sierra Trading Post's advertised reference prices;

1 c. The accuracy of Sierra Trading Post's representations that it is a discounter
2 who primarily sells close-outs and excess inventory;

3 d. Whether the pled conduct of Sierra Trading Post causes injury to the
4 business or property of consumers;

5 e. Whether the pled conduct of Sierra Trading Post is injurious to the public
6 interest;

7 f. Whether an advertised reference price constitutes a warranty;

8 g. Whether Sierra Trading Post's Terms of Use (including the arbitration
9 provision contained therein) is a valid or enforceable contract;

10 h. Whether Sierra Trading Post should be ordered to pay damages or disgorge
11 unjust enrichment; and

12 i. Whether Sierra Trading Post should be enjoined from further engaging in
13 the misconduct alleged herein.

14 98. The prosecution of separate actions by individual members of the Class would
15 create a risk of inconsistent or varying adjudications with respect to individual members of the
16 Class which would establish incompatible standards of conduct for the party opposing the class.

17 99. The party opposing the Class has acted or refused to act on grounds generally
18 applicable to the Class, thereby making appropriate final injunctive relief or corresponding
19 declaratory relief with respect to the Class as a whole.

20 100. *Typicality*. Plaintiff's claims are typical of Class members' claims. Plaintiff and
21 Class members all sustained injury as a result of Defendants' practices and schemes.

22 101. *Adequacy*. Plaintiff will fairly and adequately protect Class members' interests.
23 Plaintiff has no interests antagonistic to Class members' interests. Plaintiff has retained counsel
24 who has considerable experience and success in prosecuting complex class action and consumer
25 protection cases.

26 102. *Superiority*. A class action is the superior method for fairly and efficiently
27 adjudicating this controversy for the following reasons, without limitation:

28 a. Class members' interests are relatively small compared to the burden and

1 expense required to litigate each of their claims individually, so it would be impracticable for
2 Class members to seek individual redress for each defendant's illegal and deceptive conduct;

3 b. Even if Class members could afford individual litigation, the court system
4 could not. Individual litigation creates the potential for inconsistent or contradictory judgments
5 and increases the delay and expense to all parties and to the court system. By contrast, a class
6 action presents far fewer management difficulties and provides the benefits of single adjudication,
7 economy of scale, and comprehensive supervision by a single court; and

8 c. Plaintiff anticipates no unusual difficulties in managing this class action.

9
10 **CAUSES OF ACTION**

11 **COUNT I**

12 **Violation of the Washington Consumer Protection Act**
13 **(RCW Chapter 19.86)**
14 **AGAINST DEFENDANT SIERRA TRADING POST, INC.**
15 **AND DEFENDANT DOES 1 TO 20**

16 103. Plaintiff realleges and incorporates by reference Paragraphs 1 through 102,
17 inclusive, as though alleged in full in this Count.

18 104. The acts and omissions of Defendant Sierra Trading Post and Does 1 through 20,
19 inclusive, constitute unfair methods of competition and/or unfair or deceptive acts or practices
20 which directly or indirectly affect the people of the State of Washington and which have injured
21 Plaintiff Weimin Chen and the members of the Class in his or her or its business or property and
22 been the cause of said injury.

23 105. Defendant Sierra Trading Post and Does 1 through 20, inclusive, engage in the
24 conduct of trade or commerce. For example, and without limitation, Defendant Sierra Trading
25 Post engages in the sale of assets (including the tangible personal property that the defendant
26 sells) and engaged in commerce directly or indirectly affecting the people of the State of
27 Washington.

28 106. As a direct, substantial and/or proximate result of these violations, Plaintiff and the
members of the Class suffered injury to business or property. Plaintiff and the members of the
Class paid more than they otherwise would have paid for the products they purchased from the

1 defendants and they bought more than they otherwise would have bought from the defendants.
2 The defendants' false reference pricing scheme fraudulently increased demand from consumers,
3 enabling them to charge higher prices than they otherwise could have charged.

4 107. The acts and/or omissions of each defendant pled herein are injurious to the public
5 interest because said acts and/or omissions: violate a statute that incorporates Chapter 19.86 of the
6 Revised Code of Washington, violate a statute that contains a specific legislative declaration of
7 public interest impact, injures other persons, had the capacity to injure other persons, and/or has
8 the capacity to injure other persons.

9 108. The unlawful acts and omissions pled herein were committed in the course of the
10 defendants' business. The unlawful acts and omissions pled herein were, are and continue to be
11 part of a pattern or generalized course of conduct. The unlawful acts and omissions pled herein
12 were repeatedly committed prior to the acts involving Plaintiff Chen. There is a real and
13 substantial potential for repetition of the defendants' conduct after the act involving Plaintiff
14 Chen; indeed, the conduct continues to this day with regard to many consumers. This Complaint
15 is not based upon a single transaction. The acts and omission of the defendants pled herein were
16 and are not reasonable in relation to the development and preservation of business.

17 109. The defendants should be ordered to pay actual damages to Plaintiff and to the
18 members of the Class in an amount at least equal to all monies improperly accepted, received or
19 retained.

20 110. The defendants should, either in the alternative or cumulatively or otherwise, be
21 ordered to disgorge or make restitution of all monies improperly accepted, received or retained.

22 111. The balance of the equities favors the entry of permanent injunctive relief against
23 the defendants. Plaintiff, the members of the Class and the general public will be irreparably
24 harmed absent the entry of permanent injunctive relief against the defendants. Plaintiff, the
25 members of the Class and the general public lack an adequate remedy at law. A permanent
26 injunction against the defendants is in the public interest. The defendants' unlawful behavior is
27 ongoing as of the date of the filing of this pleading; absent the entry of a permanent injunction,
28

1 the defendants' unlawful behavior will not cease and, in the unlikely event that it voluntarily
2 ceases, is likely to reoccur.

3 **COUNT II**

4 **Breach of Express Warranty
(RCW 62A.2-313)**

5 **AGAINST DEFENDANT SIERRA TRADING POST, INC.,
6 AND DEFENDANT DOES 1 TO 20**

7 112. Plaintiff realleges and incorporates by reference Paragraphs 1 through 102,
8 inclusive, as though alleged in full in this Count.

9 113. The reference pricing advertised by Sierra Trading Post, as pled herein,
10 constitutes, for each product so advertised, an affirmation of fact or promise made by the seller to
11 the buyer which relates to the goods and becomes part of the basis of the bargain. The advertised
12 reference prices therefore create an express warranty that the goods shall conform to the
13 affirmation or promise.

14 114. The reference pricing advertised by Sierra Trading Post, as pled herein,
15 constitutes, for each product so advertised, a description of the goods which is made part of the
16 basis of the bargain. The advertised reference prices create an express warranty that the goods
17 shall conform to the description.

18 115. The advertised reference price for each product is not merely Sierra Trading Post's
19 opinion or commendation of the goods. Sierra Trading Post's reference prices constitute
20 affirmations of fact or promises, for example, but without limitation, that the same item was
21 previously sold by Sierra Trading Post at the reference price in an appropriate quantity for an
22 appropriate period of time, that the same item was sold for the reference price in an appropriate
23 quantity by a comparable retailer for an appropriate length of time, that the quality of the item
24 being sold matches the quality of the item whose reference price is being advertised, that the
25 references prices comply with Washington State law, and/or that the reference prices comply with
26 the rules of the Federal Trade Commission.

27 116. Plaintiff Chen and the members of the Class relied upon said express warranty
28 when purchasing products from Sierra Trading Post.

1 117. Sierra Trading Post has breached these express warranties. Without limitation, for
2 example, the former price or market price of each product purchased by Plaintiff Chen and the
3 members of the Class was not the reference price stated by Sierra Trading Post in its
4 corresponding advertising. For example, the reference price advertised by Sierra Trading Post for
5 many products was not the former price or market price of that product, but was instead the price
6 of a different and often higher quality product.

7 118. Sierra Trading Post has breached its warranties, and, by those breaches, has
8 harmed Mr. Chen and the members of the Class.

9 119. By a letter dated July 27, 2018, Plaintiff Chen notified Sierra Trading Post in
10 writing of the misconduct which constituted a breach of its express warranties. Sierra Trading
11 Post did not rectify the situation.

12 120. As a consequence of Sierra Trading Post's breach of these express warranties,
13 Plaintiff Chen and the members of the Class has been harmed in his or her or its money, business
14 or property, with the failure of the products to be as represented a substantial factor in causing the
15 harm.

16 121. The balance of the equities favors the entry of permanent injunctive relief against
17 the defendants. Plaintiff, the members of the Class and the general public will be irreparably
18 harmed absent the entry of permanent injunctive relief against the defendants. Plaintiff, the
19 members of the Class and the general public lack an adequate remedy at law. A permanent
20 injunction against the defendants is in the public interest. The defendants' unlawful behavior is
21 ongoing as of the date of the filing of this pleading; absent the entry of a permanent injunction,
22 the defendants' unlawful behavior will not cease and, in the unlikely event that it voluntarily
23 ceases, is likely to reoccur.

24 **COUNT III**

25 **Permanent Public Injunctive Relief**
26 **(RCW § 19.86.093)**
27 **AGAINST DEFENDANT SIERRA TRADING POST, INC.,**
28 **AND DEFENDANTS DOES 1 TO 20**

1 122. Plaintiff realleges and incorporates by reference Paragraphs 1 through 102,
2 inclusive, as though alleged in full in this Count.

3 123. This is a private action in which an unfair or deceptive act or practice is alleged
4 under Section 19.86.020 of the Revised Code of Washington.

5 124. The acts and omissions of Defendant Sierra Trading Post and Does 1 through 20,
6 inclusive, constitute unfair methods of competition and/or unfair or deceptive acts or practices
7 which directly or indirectly affect the people of the State of Washington and which have injured
8 Plaintiff Chen and the members of the Class in his or her or its business or property and been the
9 cause of said injury.

10 125. Defendant Sierra Trading Post and Does 1 through 20, inclusive, engage in the
11 conduct of trade or commerce. For example, and without limitation, Defendant Sierra Trading
12 Post engages in the sale of assets (including the tangible personal property that the defendant
13 sells) and engaged in commerce directly or indirectly affecting the people of the State of
14 Washington.

15 126. As a direct, substantial and/or proximate result of these violations, Plaintiff Chen
16 and the members of the Class suffered injury to business or property. Plaintiff Chen and the
17 members of the Class paid more than they otherwise would have paid for the products they
18 purchased from the defendants and they bought more than they otherwise would have bought
19 from the defendants. The defendants' false reference pricing scheme fraudulently increased
20 demand from consumers, enabling them to charge higher prices than they otherwise could have
21 charged.

22 127. The acts and/or omissions of each defendant pled herein are injurious to the public
23 interest because said acts and/or omissions: violate a statute that incorporates Chapter 19.86 of the
24 Revised Code of Washington, violates a statute that contains a specific legislative declaration of
25 public interest impact, injures other persons, had the capacity to injure other persons, and/or has
26 the capacity to injure other persons.

27 128. The unlawful acts and omissions pled herein were committed in the course of the
28 defendants' business. The unlawful acts and omissions pled herein were, are and continue to be

1 part of a pattern or generalized course of conduct. The unlawful acts and omissions pled herein
 2 were repeatedly committed prior to the acts involving Plaintiff Chen. There is a real and
 3 substantial potential for repetition of the defendants' conduct after the act involving Plaintiff
 4 Chen; indeed, the conduct continues to this day with regard to many consumers. This Complaint
 5 is not based upon a single transaction.

6 129. The defendants have an affirmative duty under the law to advertise their products
 7 in a manner which is not false, deceptive or misleading. Plaintiff Chen and the rest of the public
 8 should not be put to the burden of having to guess or take extraordinary efforts to ascertain which
 9 discounts or other representations made by a defendant in its advertising are true or false, accurate
 10 or misleading. Mr. Chen and the general public have the right to assume that all of the
 11 defendant's advertising conforms with the law.

12 130. If not enjoined by order of this Court, the defendants will or may continue to injure
 13 Plaintiff Chen and consumers through the misconduct alleged herein. Without the entry of a
 14 permanent injunction, the defendants' unlawful behavior is capable of repetition, re-occurrence or
 15 increase.

16 131. The balance of the equities favors the entry of permanent injunctive relief against
 17 the defendants. Plaintiff Chen, the members of the Class and the general public will be irreparably
 18 harmed absent the entry of permanent injunctive relief against the defendants. Plaintiff Chen, the
 19 members of the Class and the general public lack an adequate remedy at law. A permanent
 20 injunction against the defendants is in the public interest. The defendants' unlawful behavior is
 21 ongoing as of the date of the filing of this pleading; absent the entry of a permanent injunction,
 22 the defendants' unlawful behavior will not cease and, in the unlikely event that it voluntarily
 23 ceases, is likely to reoccur or is otherwise capable of reoccurring.

24 COUNT IV

25 Uniform Declaratory Judgments Act 26 (RCW 7.24) 27 AGAINST DEFENDANT SIERRA TRADING POST, INC., 28 AND DEFENDANTS DOES 1 TO 20

1 132. Plaintiff realleges and incorporates by reference Paragraphs 1 through 102,
2 inclusive, as though alleged in full in this Count.

3 133. Defendant Sierra Trading Post, Inc., contends on its website that its Terms of Use
4 (including an arbitration provision contained therein) constitutes a written contract which is
5 binding upon its customers.

6 134. In stark contrast, Plaintiff and the members of the Class contend that Sierra
7 Trading Post's Terms of Use (including an arbitration provision contained therein) does not form
8 a contract with Plaintiff or with any member of the Class or, in the alternative, is not enforceable
9 in the event that the Terms of Use do form a contract.

10 135. Sierra Trading Post's Terms of Use (including an arbitration provision contained
11 therein) do not form a contract or do not form an enforceable contract for, without limitation, the
12 following reasons:

13 a. Customers who purchase from Sierra Trading Post retail stores do not
14 assent to and/or are not required to assent to the Terms of Use;

15 b. Customers who purchase from the Sierra Trading Post mobile app as Guest
16 customers do not assent to and/or are not required to assent to the Terms of Use;

17 c. Customers who purchase from the Sierra Trading Post mobile app as
18 Member customers do not assent to and/or are not required to assent to the Terms of Use;

19 d. Customers who purchase from the Sierra Trading Post mobile website as
20 Guest customers do not assent to and/or are not required to assent to the Terms of Use;

21 e. Customers who purchase from the Sierra Trading Post mobile website as
22 Member customers do not assent to and/or are not required to assent to the Terms of Use;

23 f. The Sierra Trading Post Terms of Use did not contain an arbitration
24 provision prior to December 2016;

25 g. Customers who purchase from the Sierra Trading Post desktop website do
26 not assent to and/or are not required to assent to the Terms of Use because, without limitation,
27 the "browsewrap" Terms of Use provided by Sierra Trading Post is inconspicuous, does not
28 provide actual or constructive notice, and would not be seen by the ordinary consumer exercising

1 reasonable care.

2 136. Plaintiff Chen and each member of the Class are persons interested under a
3 purported deed, will, written contract or other writing purportedly constituting a contract and/or
4 are persons whose rights, status or other legal relations are affected by a purported statute,
5 municipal ordinance, contract or franchise.

6 **PRAYER FOR RELIEF**

7 Plaintiff WEIMIN CHEN, on behalf of himself individually, on behalf of a class
8 composed of all others similarly situated and/or as a private attorney general seeking the
9 imposition of public injunctive relief, hereby respectfully requests that this Court order relief and
10 enter judgment against Defendant Sierra Trading Post, Inc., and Defendants Does 1 through 20,
11 inclusive, individually and/or jointly and/or severally and/or as otherwise appropriate, as follows:

12 A. That the Court enter an order certifying the proposed Class and appointing
13 Plaintiff and his counsel to represent the Class;

14 B. For damages, including actual damages to Plaintiff and the Class in an amount to
15 be determined at trial but which is more than \$100,000 and which is estimated to be
16 approximately \$23 million;

17 C. For additional damages up to an amount not to exceed three times the actual
18 damages sustained by the Plaintiff and the members of the Class up to any applicable statutory
19 maximum;

20 D. For disgorgement or restitution, including, without limitation, disgorgement of all
21 revenues, profits and/or unjust enrichment that each defendant obtained, directly or indirectly,
22 from Plaintiff and the members of the Class or otherwise as a result of the unlawful conduct
23 alleged herein;

24 E. For nominal damages;

25 F. For an order that each defendant be permanently enjoined from the unlawful
26 conduct alleged herein;

27 G. For an order that each defendant must, on its websites and mobile apps and
28 advertising and all communications to the public, limit use of the terms "Compare at" or "retail

1 price" to comparisons with the identical product and limit use of the terms "Compare Similar" or
2 "Comparable Value" to comparisons with a different product of similar quality — and that each
3 Defendant make the distinction clear as to each product being advertised using the term
4 "Compare at," "retail price," "Compare Similar," or "Comparable Value";

5 H. For an order that each defendant is barred from using the terms "Closeout" and
6 "last year's model or color" to describe an item unless the item truly is a close-out or excess
7 inventory of last year's model or color which defendants acquired from another retailer or
8 manufacturer;

9 I. For an order that each defendant is barred from advertising and representing that it
10 is a discounter who primarily sells close-outs and excess inventory when in fact that is not the
11 case;

12 J. An order that, to the extent that the "Compare at \$xx.xx" or any similar language
13 adjacent to or describing a reference price on each product page links to or launches a disclosure,
14 then the "Compare at \$xx.xx" or any similar language shall, on each product page, be rendered in
15 a manner which makes it obvious to the ordinary consumer exercising reasonable care that the
16 language is a hyperlink;

17 K. An order that each defendant maintain records for at least two years from the date
18 of advertisement of the source of the reference price for auditing purposes to ensure compliance
19 with the ordered injunctive relief;

20 L. An order that the Court retain jurisdiction to police each defendants' compliance
21 with the permanent injunctive relief;

22 M. For an order declaring that Plaintiff Chen and/or some or all members of the Class
23 are not bound by the Sierra Trading Post Terms of Use;

24 N. For pre-judgment and/or post-judgment interest to the extent allowed by law;

25 O. For attorneys' fees to the extent allowed by law;

26 P. For costs to the extent allowed by law; and/or

27 Q. Such other relief as the Court deems just and proper including, without limitation,
28 temporary or preliminary or permanent injunctive relief.

1 DATED this 4th day of October, 2018.

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3 Presented by:
4 HATTIS & LUKACS

5 By: 

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